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IN THE

Supreme Court of the United States

No. 73-115

October Term, 1972

HYMEN SCHLESINGER and DAVID A. HENSLER,
Petitioners,

vs.

HON. HUBERT TEITELBAUM, UNITED STATES DISTRICT JUDGE,
Respondent,

and

POINT TOWING COMPANY, INC., RIVER TRANSPORTATION, INC. and M. G. TRANSPORT SERVICES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1. Reports of Opinions in the Courts Below

The opinion of the Court of Appeals for the Third Circuit is reported in 475 F. 2d 137 and a copy is attached hereto. No opinion was filed by the District Court.

2. Grounds on Which Jurisdiction is Invoked

The date of the judgment sought to be reviewed is March 9, 1973. Petition for Rehearing was timely filed and denied by the Court of Appeals on April 13, 1973.

3. Statutes Conferring Jurisdiction to Review Judgment

Jurisdiction to review the judgment is contained in 28 U. S. C. 1254(1) and 2101(c).

4. Questions Presented

a. Does the District Court have the power *sua sponte* to set aside an agreement for counsel fees entered into between a seaman and his attorney?

b. Does the District Court have the power to adopt and apply as a guide in seamen's cases a fixed schedule of fees, and, if so, may it do so without notice to the bar and a full evidentiary hearing and other safeguards of procedural due process?

c. Are the actions of Judge Teitelbaum in this case discriminatory as applying only to seamen and violative of due process under the Fifth Amendment of the Constitution?

5. Constitutional Provisions Involved in the Case

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> "Article V. No person shall . . . be deprived of life, liberty or property without due process of law, . . ."

6. Statement of the Case

1. David A. Hensler, petitioner and plaintiff below filed an action as a seaman for personal injuries against Point Towing Company, Inc., River Transportation, Inc. and M. G. Transport Services, Inc., respondents in this proceeding (hereinafter referred to as defendants). The action was filed in the Untied States District Court, Western District of Pennsylvania, at Civil Action No. 71-331. Hymen Schlesinger, petitioner, has been the attorney for plaintiff in said action.

2. In due course, the case came on for trial before Judge Hubert Teitelbaum and in the course of trial a compromise settlement in the amount of $17,500.00 was agreed upon by the parties with the assistance of the trial judge. The trial of the personal injury action was recessed and the Court proceeded to hold a hearing to approve the settlement.

3. At the said hearing the trial judge, stating that the Court was the guardian of the seamen and had the power to fix counsel fees, proceeded, over objection, to fix the fee of plaintiff's attorney, Hymen Schlesinger. The Court was informed by plaintiff that counsel fees of one-third or 33⅓% of the settlement had been agreed upon by plaintiff and his counsel, but nevertheless the Court stated that he saw fit to follow as a guideline a schedule of fees fixed by the members of the Court in seamen's cases. The Court stated further that he believed the fee he awarded to be fair.

4. Despite the fact that neither plaintiff nor his counsel requested any change in the fee contract, the Court *sua sponte* stated that he had the power to change the contract in a seaman's case and, unless told by the "circuit" that he has no such power, it is his intention to do so.

5. Local Rule 20 of the District Court prescribes the procedure in the settlement of seamen's cases and provides in paragraph (d) thereof that the Court may fix counsel fees.

6. At a meeting of the Board of Judges of the District Court held April 20, 1971, the Board adopted a motion to amend the schedule of fees, namely, on the first $10,000.00—33⅓%; on the next $90,000—25% and on recovery in excess of $100,000—15%. This schedule was to prevail pending further study.

7. The schedule of fees was adopted without notice to the bar, either before or after its adoption, without any hearing whatsoever and without any statutory or other authority.

8. Subsequent to the hearing held by Judge Teitelbaum in this case, plaintiff's counsel filed a petition requesting approval of the compromise settlement as required by local Rule 20 upon which the Court entered an order on December 11 approving the settlement and directing that there be escrowed with the Clerk the amount of $625.00 representing the difference between the fee agreed upon between plaintiff and his attorney, $5833.33, and the fee fixed by the Court, $5208.33, pending resolution of the controversy.

9. Petitioners filed a petition for writ of mandamus and prohibition in the Court of Appeals which was denied on March 9, 1973. A petition for rehearing was also denied.

7. Reasons why the Writ should Issue

a. In the absence of specific statutory authority, the district court is without power to adopt by rule, resolution or motion in personal injury cases of seamen, a schedule of attorneys' fees. *Shannon v. Cross,* 222 N. W. 168, 245 Mich., 220; *Thatcher v. Industrial Com.,* 207 F. 2d 178, 115 Utah 568. This amounts to creating a standard by which fees are to be gauged and creates a presumption that fees higher than the schedule are excessive or exorbitant.

b. Assuming *arguendo* but not conceding the proposition that courts have the power to regulate fees, this is an adjudicatory power which comes into fruition when adversary interests are involved and an issue is created requiring production of evidence and other safeguards of procedural due process. Such power may also exist based upon the power of discipline over attorneys for charging unconscionable fees. Such power operates retrospectively and must be distinguished from the prospective operation of a rule or resolution adopted by the Board of Judges which amounts to judicial legislation, as well as prejudging a case.

c. The action of the District Court is discriminatory inasmuch as it applies only in seamen's cases. Unlawful discrimination amounts to a denial of due process under the 5th Amendment of the Constitution. *Bolling v. Sharpe,* 347 U. S. 497.

d. The actions of the Board of Judges in adopting a fixed schedule of fees and the conduct of Judge Teitelbaum in applying it as a guide in this case constitutes an interference with the right of contract between attorney and client and, since it diminishes the fee of counsel, it amounts to deprivation of property without due process in contravention of the 5th Amendment.

e. Congress in adopting the Jones Act, 46 U. S. C. A. 688 and the Federal Employers Liability Act, 45 U. S. C. A. 51 *et seq.*, saw fit not to regulate fees of attorneys nor to confer any power on the courts to do so.

f. Attorneys' fees of ⅓ of compromise settlements over $10,000.00 have been found to be *reasonable* in Jones Act cases involving the death of seamen where fiduciaries brought the action and minor children were involved and where the District Judge properly had the power to fix fees. *Moore v. C/S Fram*, 226 F. Supp. 816 (D. C. Tex.), affd. 328 F. 2d 868 (5 Cir.); *In re Southern S. S. Co.*, 135 F. Supp. 358 (D. C. Del.). It should be noted that in Pennsylvania, courts are empowered by statute to fix fees in death actions, and as to minors, the latter are deemed incapable of entering into contracts for attorneys fees in actions pending before a court.

g. The theory of guardianship upon which the lower court predicated its actions confers no such power. The latest pronouncement that the court is the guardian of the seamen is *U. S. Bulk Carriers Inc. v. Arguelles*, 400 U. S. 351. Neither that case nor any reported case on the guardianship theory contains any authority for adoption by court rule of a fixed schedule of fees. See *e.g. Vaughan v. Atkinson*, 369 U. S. 527, where the Court refused to pass on the reasonableness of a 50% attorney's fee since the matter had not been considered by the lower courts.

h. Approval by the Court of Appeals of the fixed fee schedule and its application by Judge Teitelbaum sets a dangerous precedent throughout the nation. In this connection, the declaration at the hearing by Judge Teitelbaum: "I haven't the slightest doubt the court can control fees of anybody if they wanted to . . ." is an eloquent

claim of power to regulate attorneys' fees *generally* depending only on the *mere exercise by the Court of volition.* It can be easily seen that the action of the District Court and Judge Teitelbaum is an opening wedge toward regulation of contingent fees in all tort litigation.

i. The Court of Appeals concludes that the District Court had the power to adopt the rule of April, 1971 (Op., p. 9). Such conclusion is premised in part on this Rule 83 of the F. R. C. P. There are several things wrong with this holding.

First, Rule 83 requires that local rules "shall upon their promulgation be furnished to the Supreme Court." The prescribed fee schedule was secretly adopted "pending further study of the problem". It was never published nor was any notice ever given to the bar before or after its adoption.

The rule is invalid since it affects substantive rights of counsel and client. Local rules govern procedure only and may not affect substantive rights. Washington-Southern Nav. Co. v. Balt. & Phila. Steamboat Co., 236 U. S. 629, 635.

It may be theoretically argued that the rule prescribing a schedule of fees is merely procedural, but actually and realistically it is substantive and has criminal sanctions built into it. The rule in question establishes a schedule of fees. The Court of Appeals in construing the rule stated in its Opinion, p. 2, that it provides that such fees as guidelines shall be considered fair and reasonable and fees in excess of the schedule "shall constitute unreasonable compensation in violation of the Code of Professional Responsibility of the American Bar Association".

j. The Court of Appeals erroneously equates the power of the District Court to adjudicate a specific controversy over counsel fees with the legislative power to fix a standard of fees.

k. The case of *Gair v. Peck*, 160 N. E. 2d 43, does not support the conclusion of the Court of Appeals. Strong reliance is placed upon *Gair* in support of its conclusion that the district court has the power to adopt a rule fixing a schedule of fees.

However, *Gair* is a slender reed for a number of reasons, the chief one being that the Court of Appeals of New York validated the rule as being within the *statutory power.* 160 N. E. 2nd at p. 53.

The Opinion in our case, p. 7, appears to base its decision in part on the Court's "supervisory power over the members of its bar . . ." This probably refers to the concept that attorneys are officers of the court. This doctrine has strict limitations. *Cammer v. U. S.*, 350 U. S. 399, 405.

In view of the limitations on the doctrine in *Cammer*, the basis of the Court's Opinion here is illogical, creating as it does a presumption of unprofessional conduct subjecting the attorney to penalties for charging fees in excess of the schedule. Truly, the contested rule has criminal aspects.

l. The issues involve questions of exceptional importance as well as serious constitutional questions of due process, unlawful discrimination, impairment of contract, retroactive application of the rule, and potential criminal sanctions. In this connection we respectfully direct the court's attention to American Trial Lawyers Association v. New Jersey Supreme Court, 34 L. Ed. 2nd 651. In that

case the Court unanimously reversed a dismissal of an action involving several similar issues. Although the decision was based on the abstention doctrine and the Court did not rule on the merits, nevertheless we believe that the Court recognized by implication the substantiality of the issues. That case involved issues of violation of federal constitutional rights by the State Supreme Court in adopting a rule fixing the schedule of fees in tort cases.

m. This petition presents the issue of the district court's power to legislate judicially in the matter. Unless your Honorable Court grants review of the actions of the lower courts, there is likelihood that the actions of the courts below will serve as a precedent for similar actions in other circuits.

Wherefore, petitioners respectfully pray your Honorable Court to grant a writ of certiorari directed to the Court of Appeals for the Third Circuit and to the District Court for the Western District of Pennsylvania commanding them to certify the record in this cause so that the matter may be reviewed by this Court.

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